IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 207 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

ANILBHAI PRABHUBHAI

Appearance:
MR KC SHAH, ld.ADDL. PUBLIC PROSECUTOR for appellant
MR BS SUPEHIA, for Respondent

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 17/01/2002

ORAL JUDGEMENT

The State of Gujarat, having been aggrieved by the inadequacy of sentence imposed on the respondent, by judgment and order dated 6.11.1992 by the learned Asstt.Sessions Judge, Navsari in Sessions Case No.13 of

1990, for committing offence under Section 363 of the Indian Penal Code, has preferred this appeal under Section 377 of the Code of Criminal Procedure for enhancement of the sentence.

2. The facts in short which transpire from the record constituting the prosecution case are as under:

The complainant of this case was residing at the relevant point of time, in village Nanghai, Tal. Chikhali, Dist. Valsad with his family. He has one daughter, namely, Urmila who, at that time was studying in Xth Std. in the High School, at Nanghai. On 25th October 1989 while the complainant and his wife had gone to their field for agricultural work, their daughter Urmila, son Rajesh and also the complainant's mother Paliben were at home. When the complainant and his wife returned in the evening, their son Rajesh informed them that he had seen Urmila and the respondent talking to each other. They were thereafter seen proceeding towards the shop. Rajesh informed his parents that both of them had been since then missing. It is the say of the complainant that even one-and-half-month prior to the alleged incident, the respondent had caught hold of the hands of Urmila and had started dragging her and it was only with the intervention of other girls of the school, she was saved. Since the respondent and Urmila did not return for quite some time and because their efforts to find them out did not yield any positive result, on 28th October 1989 at about 6.00 p.m. the First Information Report (FIR) was lodged at Chikhali Police Station by the complainant. On receipt of the FIR, the police registered the offence at CR.No.I-189/89 for offences under Sections 363, 366 and 376 of Indian Penal Code. After registration of the offence, the usual investigation commenced during which, the Investigating Officer recorded the statements of the persons conversant with the facts of the case, drew the necessary panchnamas including that of the scene of offence etc. In the meanwhile, during the pendency of the investigation, the girl who was kept at the place of maternal uncle of the respondent returned home. On her arrival, the police interrogated her and recorded her statement. The police also drew the panchnama of the under-garments and other clothes of the girl and got her medically examined by the Medical Officer of the Community Health Centre, Chikhali, Dist. Valsad. At the end of investigation, the police submitted the chargesheet in the Court of learned Judicial Magistrate, First Class, Chikhali. Incidentally, it may be stated here that upon medical examination of the girl, it was found that she was

subjected to sexual intercourse and hence the offence under Section 376 of the Indian Penal Code came to be added which is exclusively triable by the Court of Sessions and therefore, the case was committed to the Court of Sessions.

At the trial, the learned Asstt.Sessions Judge, Valsad at Navsari, framed the charge at Exh.1 against the respondent for offences under Sections 363, 366 and 376 of the Indian Penal Code. He denied the charge and claimed to be tried. At the trial, in support of its case, the prosecution examined eight witnesses and also produced certain documentary evidence in the form of the birth certificate in original at Exh.23, the medical certificate of Urmila, medical examination report by the Medical Officer of Community Health Centre, Chikhali at Exh.16, medical certificate of the respondent at Exh.17, panchnama of the scene of offence at Exh.5, panchnama of the clothes of Urmila at Exh.6, the report of Forensic Science Laboratory (FSL), etc. On completion of recording of the oral evidence, the further statement of the respondent under Section 313 of the Code of Criminal Procedure was recorded in which he denied all the circumstances which had appeared against him in the evidence. In other words, his defence was that of general denial.

At the end of the trial, the learned Asstt.Sessions Judge came to the conclusion that the prosecution had not been able to prove the offences under Sections 366 and 376 of the Indian Penal Code against the respondent. However, he held the respondent guilty of committing offence under Section 363 of the Indian Penal Code and convicted him for the same and on the question of sentence, after hearing the respective submissions of prosecution as well as the defence, the learned Judge imposed a sentence of Simple Imprisonment of 15 days and to pay a fine of Rs.200/- in default, to further Simple Imprisonment of 7 days.

3. I have been informed that the State has not preferred any appeal against the order of acquittal of the respondent for the alleged offence under Sections 366 and 376 of the Indian Penal Code and similarly, the respondent has not preferred any appeal challenging the judgment and order of conviction and sentence passed by the learned trial Judge for committing offence under Section 366 of the Indian Penal Code. The present appeal is, therefore, filed only for the limited purpose of enhancement of sentence.

4. At the hearing of this appeal, Mr.K.C.Shah, learned Addl. Public Prosecutor appeared for the State and Mr.B.S.Supehia, learned Counsel appeared for the respondent. They have taken me through the entire record of the case including the oral as well as documentary evidence. Mr.Shah has urged that looking to the penal provisions as contained in Section 363 of the Indian Penal Code, maximum sentence of seven years together with fine as prescribed is to be imposed as the sentence imposed by the learned trial Judge is hopelessly inadequate and it deserves to be enhanced. According to him, the girl at the relevant point of time was aged only 15 years and she happened to be a distant relative of the respondent and that way she happened to be his sister and in spite of that, he had developed intimacy with the girl and had forcibly kidnapped her out of the lawful guardianship and the lawful custody of her parents without their consent and knowledge. In this set of facts, no lenient view can be shown.

As against that, Mr.B.S.Supehia, learned Counsel appearing for the respondent has submitted that the learned trial Judge has not committed any error while imposing on the respondent the sentence of Simple Imprisonment of 15 days and to pay the fine of Rs.200/inasmuch as he has rightly taken into consideration the facts that, at the relevant point of time, the respondent was studying T.Y.B.A. and that his future may get totally ruined if any heavy sentence was passed. Moreover, the girl Urmila, by the time, had already married to someone else and had settled down in life. It is further submitted by Mr.Supehia, learned Counsel for the respondent that the incident took place way back in the year 1989 and after a lapse of about 13 years, no useful purpose would be served by enhancing the sentence. According to him, the appeal deserves to be dismissed.

5. I have gone through the evidence of the witnesses examined by the prosecution in support of its case and I have re-appreciated the same. Since this is an appeal under Section 377 of the Code of Criminal Procedure and Mr.Supehia has not chosen to raise argument challenging the conviction of the respondent under Section 363 of the Indian Penal Code though he is entitled to do so in view of Section 377 of the Code of Criminal Procedure, my task has become very limited. In other words, in this appeal, I am required to decide the question of the adequacy of the sentence imposed by the trial Court only. I, therefore, do not propose to deal with the oral as well as documentary evidence on record in toto and I only

discuss the evidence which is relevant for the purpose of deciding this appeal.

Dr.Mahesh Patel, PW2-Exh.15 has deposed that on physical as well as radiological examination of the girl, she was found to be between the age of 11 years and 20 years. The examination of her private parts did not in fact show any sign of rape having been committed on her nor did her other parts of body physically bear any marks of rape. He, however, stated that at the time of examination, the girl had informed him that she had sexual intercourse with a man and that was about 48 to 72 hours prior to her medical examination by the Medical Officer. The medical certificate of Urmila issued by the Medical Officer, Community Health Centre dated 30th October 1989 is produced at Exh.16. Another certificate at Exh.17 is also produced which is issued by the Medical Officer, Community Health Centre, Chikhali stating that the girl had sexual intercourse within a period of 7 to 10 days prior to her examination and also that her blood group was A+.

6. Considering the evidence of this witness, it appears that Urmila had sexual intercourse with some man about 48 to 76 hours prior to her examination. However, no signs of rape and any physical struggle appeared on her private part as well as on the parts of the body. The radiological and physical examination conducted by this witness also does not fix the age of the girl and besides, the variation stated by him is of nine years.

The victim girl Urmila is examined as PW3 at Exh.18. At the time of recording of the evidence, she was already of 21 years of age. In her evidence, she has stated that at the relevant time, she was staying with her father and she was studying in the High School of the village. According to her, she has studied upto Xth Std. She has also stated that she knew the respondent who belonged to her village and while she was studying in Xth Std., the respondent had taken her to the house of his paternal uncle at village Kharvel. After staying there for about two-three days, Urmila was shifted from that place by the respondent and was kept in the house of her maternal uncle. After staying there for some time, she returned home. She has further stated in her examination in chief that the respondent had neither told her anything nor had done anything with her. The prosecution was, therefore, required to declare this witness as hostile. In the cross examination by the learned Public Prosecutor, she has stated that she was already married, but she denied the question put to her by the learned

Public Prosecutor from her previous statement recorded by the police. She however, admitted that the respondent had taken her to his paternal uncle's place and also to her maternal uncle's place. However, she denied the suggestion of the learned Public Prosecutor that after having settled the matter with the respondent, the respondent had indulged into sexual intercourse with her. She also denied that she had ever stated to the Medical Officer that she had intercourse with a man. In her cross examination by the defence, she has stated that in the year 1989, her age could be 21-22 years. She has further stated that since the respondent belonged to her own family he was treated as cousin and they very often visited her paternal uncle's as well as maternal uncle's places as brother and sister. The evidence of other witnesses examined by the prosecution do not take its case any further.

7. Considering the aforesaid evidence, it becomes very clear that though the respondent had removed the girl out of the lawful custody of her guardians, she was never subjected to any sexual intercourse. Moreover, the evidence also shows that at the places of maternal as well as paternal uncles, no threat of rape was exercised on the girl by the respondent. In my view, therefore, the learned trial Judge was right in acquitting the respondent of offences under Sections 366 and 376 of the Indian Penal Code.

8. I, however, find in view of the learned trial Judge that so far as the offence under Section 363 of the Indian Penal Code is concerned, the prosecution has been able to prove the case against the respondent beyond any reasonable doubt and therefore, he has been rightly convicted for the said offence. Further, I find no merit in the submission made by Mr.Shah, learned Addl.Public Prosecutor to the effect that the quantum of sentence imposed by the learned trial Judge is inadequate. The learned Judge, it appears from the judgment, has taken into consideration all the relevant factors such as that the respondent was a boy studying in the College, that the girl had already married by the time her evidence was recorded, that the prosecution witnesses have turned hostile, and that the future academic career of the respondent will be ruined. It may be kept in mind that the offence had taken place way back on 25th October 1989 and after a lapse of about 13 years if either the sentence of imprisonment or the fine is enhanced, the same may adversely affect the career of the respondent. It is also to be kept in mind that the respondent has been acquitted of the offences under Sections 363 and 376

of the Indian Penal Code. In light of these circumstances, I am in total agreement with the trial Court on the question of imposing sentence on the respondent and I do not propose to disturb the same.

In short, the appeal does not have any merit and it deserves to be dismissed. The appeal is, therefore, dismissed.

(Akshay H.Mehta, J.)

Sreeram.